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No. 07-1315

In the Supreme Court of the United States

MICHAEL A. KNOWLES, Warden,
Petitioner,

v.

ALEXANDRE MIRZAYANCE,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

PETITIONER'S BRIEF ON THE MERITS

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QUESTIONS PRESENTED

Concluding that defense counsel was ineffective in advising Mirzayance to withdraw his not-guilty-by-reason-of-insanity plea, the Ninth Circuit Court of Appeals granted habeas relief without analyzing the state-court adjudication deferentially under "clearly established" law as required by 28 U.S.C. § 2254(d) and by supplanting the district court's factual findings and credibility determinations with its own, opposite factual findings. This Court vacated the Ninth Circuit decision and remanded the case for further consideration in light of *Carey* v. *Musladin*, 127 S. Ct. 649 (2006). On remand, the Ninth Circuit conceded that "no Supreme Court case has specifically addressed a counsel's failure to advance the defendant's only affirmative defense" but nonetheless concluded that its original decision was "unaffected" by *Musladin* and subsequent § 2254(d) decisions of this Court.

The questions presented are:

1. Did the Ninth Circuit again exceed its authority under § 2254(d) by granting habeas relief without considering whether the state-court adjudication of the claim was "unreasonable" under "clearly established Federal law" based on its previous conclusion that trial counsel was required to proceed with an affirmative insanity defense because it was the only defense available and despite the absence of a Supreme Court decision addressing the point?

2. May a federal appellate court substitute its own factual findings and credibility determinations for those of a district court without determining whether the district court's findings were "clearly erroneous"?

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OPINIONS AND JUDGMENTS BELOW

The opinion of the Ninth Circuit, after remand from this Court, is unpublished. The original opinion of the Ninth Circuit and the previous opinions of the district court are unpublished. The opinion of the California Court of Appeal, and the California Supreme Court's order denying habeas corpus relief, are unpublished. Each is reproduced in the appendix to the petition for writ of certiorari.

JURISDICTION

The post-remand opinion of the court of appeals was filed on November 6, 2007. The court of appeals' denial of the Warden's petition for rehearing and suggestion for rehearing en banc was filed on January 17, 2008. Pet. App. A. The petition for writ of certiorari was filed on April 16, 2008, and was granted on June 27, 2008. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. The Sixth Amendment provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

2. Section 2254 of Title 28 of the United States Code provides, in pertinent part:

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States[.]

STATEMENT OF THE CASE

1. *The Crime*

Respondent Mirzayance killed his nineteen-year-old cousin, Melanie Ookhtens, in her family's Los Angeles home on the evening of October 13, 1995. In statements to police detectives made later that night, Mirzayance described what he had done. He said that Melanie became angry when she found him watching television when they were scheduled to meet her parents at the airport. About forty seconds after she had gone to her bedroom, Mirzayance knocked on her door and asked what she was doing. Melanie said she was getting dressed, and told Mirzayance to shut the door. Pet. App. 168; State Clerk's Transcript (CT) 166. Mirzayance entered the bedroom anyway. Melanie told him to "Shut up and shut the door because I'm putting on my clothes." This "pissed off" Mirzayance. He pulled a large hunting knife from his waistband. He approached Melanie as she sat on her bed and stabbed her in the stomach. When she asked why he had stabbed her, Mirzayance stabbed Melanie in the neck. Pet. App. 39-40, 168; State Reporter's Transcript (RT) 193-92; CT 169-71.

Mirzayance further told the police that Melanie had punched and scratched him and screamed for him to "Stop, stop, stop." He said he then drew his .25 caliber laser-sighted pistol from his pocket and shot Melanie once in the stomach and three times in the head from a distance of three feet. When police asked why he used the gun, Mirzayance said, "Because she was fighting back and I had the gun in my pocket, that's why." Pet. App. 39-40, 168; RT 18; CT 172-73, 177.

Immediately after shooting Melanie, he gathered his hunting knife, some of the spent shell casings, and some of his clothes. He turned off the lights to Melanie's room and

returned to his apartment in Pasadena. There, he shed his bloody clothes, showered, and put the stained clothes in a trash bag. Pet. App. 40, 169; RT 276.

A taped message left by Mirzayance on the Ookhtenses' answering machine that evening showed an apparent effort by Mirzayance to concoct a false alibi. In that message, left at 8:07 p.m., Mirzayance stated:

> Melan, it's me. I'm sorry to call you back late. I only want to say that I couldn't make it, I can't make it tonight because, well, Laurent called . . . well, I did not go out with him for a month, so he is like let's go out, because he works on weekends. So, go pick up your parents, say 'hi' to them, drive carefully. But I'll call you guys tomorrow, like in the afternoon, try to see you, or whatever else happens, don't know. Okay? So bye-bye.

Pet. App. 40, 169.

Laurent Meira, a friend of Mirzayance, received an "anxious" and "agitated" phone called from him minutes later. RT 117. Mirzayance drove and picked Meira up around 8:30 p.m. He told Meira that it was no good to be "high" and that he had "messed up big time." Mirzayance told Meira that he had shot Melanie three times in the head and once in the stomach. Mirzayance stopped the car at a Burger King, where he threw the bag containing his bloody clothes into a trash can. Pet. App. 40-41, 169.

Meira suggested he turn himself in. Mirzayance thought for a moment, then agreed and drove to the Pasadena Police Station—after stopping at a 7-Eleven to buy a drink. Pet. App. 411, 170. At the police station, Mirzayance told a Pasadena police sergeant that, about an hour after he had smoked a couple of "hashish" cigarettes, he had argued with his cousin, followed her upstairs to her bedroom, shot her, and killed her. Pet. App. 41, 170; RT 127. He said that he had been angry with Melanie for hanging up on him the

day before. Mirzayance said that he had bought the gun five to six weeks earlier and that he had carried it in his pocket for the three days before the killing. He said he carried the hunting knife only on the day he killed Melanie.

When police asked why he stabbed and shot Melanie, Mirzayance responded, "Because she was getting too much, was causing too much bad stuff on me when I did nothing; that's why. And for the fact I was on the drugs, I didn't think what I was doing." A urine sample taken from Mirzayance four hours after the murder, however, tested negative for recent use of marijuana or hashish. Pet. App. 41, 171; CT 169.

Police retrieved the knife, gun, and a box of .25 caliber ammunition from Mirzayance's car, and a .25 caliber shell casing from his pocket. Officers also recovered the trash bag containing Mirzayance's bloody clothes from the Burger King dumpster. Pet. App. 41, 170.

The post-mortem analysis confirmed that Melanie had died of three gunshots to the head and one to the abdomen, and nine stab wounds, including two to the chest. Any of the four gunshot wounds, and two of the stab wounds, would have been fatal. The gunshot wounds to Melanie's temple were consistent with Mirzayance standing over her and shooting her in the head as she sat on the bed. The gunshot wound to the top of the skull was consistent with Mirzayance having stood over her and shooting her in the back of the head as she lay on the floor. Pet. App. 40, 169; RT 428.

2. *State Court Proceedings*

Mirzayance was charged with first degree murder. He entered pleas of not guilty and not guilty by reason of insanity (NGI). Under California law, such pleas result in a bifurcated trial. In the first phase, the jury renders a verdict solely on the question of guilt. If the jury finds the

defendant guilty, a second phase occurs in which the jury determines whether the defendant has proven by a preponderance of the evidence that he was not sane at the time of the offense. Cal. Penal Code § 1026. To prevail at this second phase, the defendant must prove that—regardless of whether he suffered from a mental disease or disability—he either could not appreciate the nature and quality of his actions at the time he committed the crime or could not appreciate the wrongfulness of those actions. Cal. Penal Code § 25(b); *People* v. *Skinner*, 704 P.2d 752, 763-65 (Cal. 1985).[1/]

One of Mirzayance's two trial lawyers, Donald Wager, sought to obtain a guilt-phase verdict of only second degree murder—a level of culpability that he conceded to the jury—and thereafter to secure an NGI verdict. In support of this defense strategy, Wager retained eight expert doctors to evaluate Mirzayance's mental health. He also retained jury consultants, conducted a mock trial in which he presented mental health defenses to two juries, hired a private investigator to interview friends and associates of Mirzayance and Melanie Oohktens, and consulted with Mirzayance's parents and their personal attorneys, James and Eric Lund. Evidentiary Hearing Exhibit (Ex.) 6 at 12 (Decl. of Dr. Vicary); Ex. 9 at 2-3, 21-34 (Work Schedule).

Wager defended against the charge of first degree murder primarily with the testimony of psychologist Paul Satz, Ph.D., the Chief of the Neuropsychiatric Practice at the Neuropsychiatric Institute at the UCLA School of Medicine, who had examined Mirzayance on four occasions and conducted thirty psychological tests on him. Pet. App. 171. Wager's strategy was to save the testimony of other

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1. Here, as discussed below, only the latter question was at issue, for no one has opined that Mirzayance failed to appreciate the nature and quality of his actions.

retained mental health experts for the sanity phase. Pet. App. 50. Dr. Satz opined that Mirzayance had "suffered from a combination of long-standing serious psychological problems, intellectual limitations, and probable brain damage." Mirzayance told Satz that his intelligence was subnormal, that he had always been a failure, and that he was unable to socialize because it was too frightening. Mirzayance said he had his first auditory hallucination when he was five years old. The voice spoke in French and sounded like a thirty-year-old man. It told him to steal from his parents, to steal candy, and to think bad thoughts, and Mirzayance felt compelled to obey. Pet. App. 171-73.

Mirzayance also told Dr. Satz that he was depressed, isolated, and withdrawn, he had been ridiculed, and he had once taunted a peer with a knife, which led to increased alienation. He told Satz that he began to hallucinate and felt he was being threatened three days before he killed Melanie. Mirzayance told Satz that the day before the killing, he was frightened when he saw spiders and a cat sitting on his stomach. Mirzayance went into his bedroom and put the knife and gun under his pillow for protection. Pet. App. 172.

Dr. Satz opined that Mirzayance might have suffered from a paranoid delusional disorder, that he probably suffered from psychosis most of his life, and that he had a psychotic break at the time of the killing. According to the doctor, a person suffering from such disorders would not understand why they committed a murder. Pet. App. 173.

Wager argued to the jury that Mirzayance had no motive to kill Melanie, and that he acted without premeditation and deliberation due to his mental disease. *Id.* The jury, however, returned a verdict of premeditated and deliberate first degree murder. Mirzayance's parents then informed Wager that they would not testify at a sanity phase. Ex. 15 at 3. Wager, after conferring with a retained expert

doctor, the parents, their personal attorney, and co-counsel Lawrence Boyle, reasoned that under the facts of the case, that "practically, factually, and legally, we could not successfully proceed with the insanity defense . . . ." *Id.* Wager then advised Mirzayance to withdraw the NGI plea. Mirzayance did so and was sentenced to prison for twenty-nine years to life.

In state habeas corpus proceedings, Mirzayance claimed that Wager had rendered ineffective assistance under *Strickland* v. *Washington*, 466 U.S. 668 (1984), for advising him to withdraw the NGI plea. Mirzayance argued that an NGI defense would have been strong and that Wager had withdrawn it for no tactical reason or benefit. Mirzayance submitted twenty-five declarations, including those from defense expert doctors, a "*Strickland* expert," a defense investigator, co-counsel Boyle, Mirzayance's parents, their personal attorneys, Mirzayance's childhood teachers in France, and several of Mirzayance's friends. Four psychiatrists and one psychologist stated in declarations that they had been prepared to testify that Mirzayance met the legal definition of insanity. They opined that Mirzayance suffered from a mental illness that prevented him from premeditating and deliberating the killing and from understanding the wrongfulness of his conduct. Exs. 1, 2, 4 & 6. The California Court of Appeal and the California Supreme Court summarily denied the claim on the merits. Pet. App. I & J.

3. *Federal Habeas Corpus Proceedings*

a. Mirzayance raised the same ineffective-counsel claim in a federal habeas petition, and presented the same documentary evidence and declarations he had submitted to the state courts. The district court denied relief, concluding that the state-court decisions were "neither contrary to nor an unreasonable application of federal law.

28 U.S.C. § 2254(d)." As the district court explained:

> Given that the jury rejected Dr. Satz's [guilt-phase expert opinion] that [Mirzayance's] mental impairments deprived him of the ability to perform the more demanding tasks of deliberating and planning a murder, defense counsel reasonably predicted that this same jury would find plaintiff fully capable of discerning right from wrong and would, therefore, reject the proffered insanity defense. Defense counsel, who knew what he had to present during the insanity defense portion of the trial, made an informed decision that he did not have sufficient evidence to cause this jury to change its mind. Having concluded that there was no chance of success on the insanity defense, counsel advised his client to waive the defense and accept the sentence of the court.
>
> . . .
>
> Accordingly, on this record, counsel's strategic decision to recommend the withdrawal of the insanity defense, made after consultation with [Mirzayance], was not an unreasonable one, and does not constitute ineffective assistance of counsel.

Pet. App. 153-54.

b. Mirzayance appealed. Concluding that "[t]he record presents conflicting reasons for the abandonment of the insanity defense," a Ninth Circuit panel remanded the case to the district court to conduct an evidentiary hearing. Pet. App. 106, 115-16. The panel noted that a hearing would "assist in determining whether there were tactical reasons for abandoning the insanity defense or if the withdrawal of the defense was a wholesale abandonment of the one viable and strong defense Mirzayance had." Pet. App. 108.

c. Following a four-day evidentiary hearing, the district court resolved the overall factual issues against Mirzayance. It found that the jury's verdict—that the

murder was "willful, premeditated, and deliberate"—signaled the failure of the defense's strategy of seeking a verdict no worse than *second* degree murder and then securing an NGI verdict. The court found that nevertheless, Wager remained willing to proceed with a sanity phase despite his assessment that it now had little chance of success in light of the jury's mental-state findings. Wager believed, however, that any remaining chance of securing an NGI verdict depended on presenting some "emotional impact" testimony by Mirzayance's parents, "which Wager had viewed as key even if the defense *had* secured a second-degree murder verdict at the guilt phase." Pet. App. 42, 48, 51. But, just before the sanity phase was to begin, Mirzayance's parents and their lawyer—to Wager's surprise—made it clear that they would not testify.

The district court determined that Wager, although angry, reasonably concluded that the parents' refusal to testify was a "done deal" and "one that any beseeching on his part could not undo." Pet. App. 71-76. Wager's NGI strategy had become "impossible to attempt." Wager was left with four experts, all of whom held an opinion—that Mirzayance did not premeditate and deliberate his crime—that the same jury about to hear the NGI evidence already had rejected under a beyond-a-reasonable-doubt standard of proof.

The district court further found that, before making a final decision, Wager had consulted with "experienced co-counsel," who concurred in Wager's recommendation that Mirzayance withdraw the NGI plea. Co-counsel Boyle believed that evidence of Mirzayance's past hallucinations could come in only through the parents' testimony, Pet. App. 71; and Mirzayance had consistently refused to testify. See Ex. 15 at 3.

The district court also found that Wager understood the law and what he needed to prove in a sanity phase, that he "carefully weighed his options before making his decision final," and that he had "made a rational choice to forgo the insanity defense." His decision was "carefully considered," "not rashly made," and "appeared to be reasonable to him and his co-counsel, in light of the guilt phase verdicts and the parents' statements to him on the way to court that morning." Pet. App. 68-71.

Crediting counsel's decision as competent, the district court opined that, under the deferential standard of review required by 28 U.S.C. § 2254(d), the state-court adjudication of the claim did not result from an unreasonable application of *Strickland*. The court also stated that its opinion would be the same even under de novo review of the record as expanded in federal court. Pet. App. 97-98.

Despite its factual and legal conclusions, however, the district court ultimately granted the writ because, in its view, the Ninth Circuit's remand order was a "mandate" that "destined [Mirzayance] to relief." The district court noted that the remand order cited the pre-AEDPA[2/] case of *Profitt* v. *Waldron*, 831 F.2d 1245 (5th Cir. 1987), an ineffective-counsel case in which the Fifth Circuit had observed that it could see "no advantage" in a trial counsel's decision to bypass an insanity defense. Pet. App. 97-98. The district court inferred that the "'nothing to lose' rule pronounced in *Profitt*" was the "substantive law of the case." Thus, the district court explained, the function of the ordered evidentiary hearing was simply to determine, de novo, "whether, in fact, Petitioner had nothing to lose." Because there was nothing that Mirzayance "*gained* by waiving the NGI trial," the district court said it was

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2. The Antiterrorism and Effective Death Penalty Act of 1996.

"bound" to find that counsel had "nothing to lose," and that his performance was therefore necessarily deficient under *Profitt*. Pet. App. 98-100 (italics added). Given the perceived mandate, the district court "reluctantly" granted relief. Pet. App. 35-37, 98-100.

d. The Warden appealed, arguing that the state-court adjudication was reasonable and therefore conclusive under § 2254(d)(1). A Ninth Circuit panel affirmed. In an unpublished 2-to-1 opinion, the panel first asserted that the district court had erred in inferring any mandate for relief from the remand order. The majority, however, did not implement the ruling denying relief that the district court stated it would have issued absent the perceived mandate. Rather, the majority affirmed the granting of the writ, "albeit on different grounds."

The panel majority replaced the district court's "key" factual findings with its own opposite findings. It found (1) that Wager had acted "rashly," and (2) that Mirzayance's parents had not refused to testify. Pet. App. 28. In light of these new factual findings, the majority asserted that "'reasonably effective assistance' would put on the only defense available, especially in a case such as this where there was significant potential for success." Pet. App. 29. The majority stated that, in light of the available defense expert opinions, there was a "reasonable probability" "that the jury would have found Mirzayance insane." *Id.* The majority did not discuss the contrary opinions reached by the two court-appointed experts—that Mirzayance was sane when he committed the crime. The majority also did not address the state courts' denial of the claim, or explain how under § 2254(d) the state-court adjudication was an unreasonable application of clearly established federal law.

In the dissenting judge's view, the majority failed to defer to the district court's well-founded "explicit factual findings." Moreover, the majority's opinion erroneously

"suggest[ed] that to avoid violating *Strickland*, an attorney must always advance any potentially non-futile, colorable, affirmative defense regardless of its questionable merit or arguable chance of success. This is not the standard established by *Strickland* and in fact suggests something more akin to the 'nothing to lose' standard set forth in *Profitt* v. *Waldron*, 831 F.2d 1245 (5th Cir. 1987)." Pet. App. 31-34.

4. *United States Supreme Court Proceedings*

When the court of appeals declined to rehear the case en banc, Pet. App. 23, the Warden petitioned this Court for certiorari. While the petition for certiorari was pending, this Court decided *Carey* v. *Musladin*, 127 S. Ct. 649 (2006). In *Musladin*, this Court reversed a Ninth Circuit grant of habeas relief premised on the circuit court's conclusion that the defendant suffered inherent prejudice when courtroom spectators wore buttons depicting the murder victim. However, because of "the lack of holdings from this Court regarding the potentially prejudicial effect of spectators' courtroom conduct of the kind involved here" and because "[n]o holding of this Court required" the states to apply the test for government-sponsored courtroom practices to spectators' courtroom conduct, this Court held that the Ninth Circuit violated § 2254(d) when it granted relief on Musladin's claim. *Id.* at 652. Several weeks later, this Court granted the Warden's petition for certiorari, vacated the judgment, and remanded this case for further consideration in light of *Musladin*. Pet. App. 22.

5. *Post-Remand Proceedings In The Ninth Circuit*

The Ninth Circuit ordered supplemental briefing from the parties on "the possible relevance of *Musladin* as well as *Schriro* v. *Landrigan*." Pet. App. 4. In *Landrigan*, 127

S. Ct. 1933 (2007), this Court had reversed a Ninth Circuit decision granting habeas relief to an Arizona prisoner on grounds that his trial counsel was ineffective under *Strickland* for failing to conduct further investigation into mitigating circumstances in a capital case, notwithstanding the defendant's instruction not to present such evidence. Applying § 2245(d), this Court emphasized that "we have never addressed a situation like this." 127 S. Ct. at 1942.

On November 6, 2007, a divided Ninth Circuit panel reinstated its original decision. The majority declared that "our decision is *unaffected* by *Musladin* or *Landrigan*, and we therefore again affirm the grant of habeas corpus." Pet. App. 4 (italics added). The majority asserted that "the fact that no Supreme Court case has specifically addressed a counsel's failure to advance the defendant's only affirmative defense does not carry the day . . . ." Pet. App. 12. The panel majority stated that *Strickland* "required here that counsel assert the only defense available, especially given the significant potential for success." Pet. App. 8, 12. Once again, the opinion did not analyze the state-court adjudication under the deferential-review standard of § 2254(d)(1). The dissenting judge found that the decision did not comport with *Musladin* or AEDPA, and he again protested "the majority's independent review of the record *without regard* to the lower court's factual and credibility findings made after a four-day evidentiary hearing." Pet. App. 13-21 (italics added).

The Warden filed a petition for rehearing and suggestion for rehearing en banc. While the Warden's petition for rehearing was pending, this Court decided *Wright* v. *Van Patten*, 128 S. Ct. 743 (2008) (per curiam). In *Van Patten*, as in the instant case, this Court had vacated a grant of habeas relief and remanded for further consideration in light of *Musladin*; and, as in this case, the court of appeals had adhered to its prior ineffective-counsel ruling granting

relief despite § 2254(d)(1). This Court then summarily reversed that decision. The Warden notified the Ninth Circuit of the *Van Patten* decision. But the court of appeals declined to rehear the case. Pet. App. 1.

SUMMARY OF ARGUMENT

Trial counsel Wager represented a defendant who had armed himself with a gun and a knife, waited for his chance to strike, and murdered a defenseless teenage girl as she sat on her bed because—in his words—she made him "pissed off." Then, as he acknowledged, he promptly cleaned up after the crime, hid the incriminating ballistic and blood evidence, and concocted a false alibi. And, when he finally turned himself in and confessed, he told police that he felt "very guilty, very bad . . . for what I've done." Finally, at trial, a jury rejected the defense testimony of a preeminent mental-health expert, and determined that the defendant had murdered his victim "willfully," "deliberately," and with "premeditation."

It would strain credulity to agree with Mirzayance's assertion that Wager—faced with all of that—then acted incompetently when he passed up a last but nevertheless doomed opportunity to prove to that same jury that his client somehow could not have know his actions were "wrong." Even more to the point, under 28 U.S.C. § 2254(d), it was indefensible for the Ninth Circuit to override the state court's ruling—one that was, at the very least, "reasonable"—that Wager's well-informed and thoughtful decision could not be condemned as unconstitutionally ineffective. The Ninth Circuit has failed to adhere to this Court's order to reconsider its ruling under the strict criteria of § 2254(d), and this Court now should reverse the judgment outright.

1. Under § 2254(d)(1), federal courts "shall not" grant habeas relief with respect to any claim adjudicated on the

merits in State court unless the adjudication resulted in a decision that was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States[.]" A state court's adjudication does not result in a decision contrary to clearly established Federal law unless the state court either "applies a rule that contradicts the governing law set forth in [this Court's] cases," *Williams* v. *Taylor,* 529 U.S. 362, 405 (2000), or "confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent," *id.* at 406. In *Carey* v. *Musladin*, 127 S. Ct. 649 (2006), this Court made it clear that, unless a "holding of this Court require[s]" a state court to apply a Supreme Court-established test to a set of facts, "the state court's decision [is] not contrary to or an unreasonable application of clearly established federal law." *Id.* at 654.

The Ninth Circuit flouted these principles—and this Court's remand order—by declaring its original, vacated decision to be "*unaffected*" by *Musladin* and this Court's subsequent § 2254(d) decisions. It erroneously applied a novel "nothing to lose" test for ineffective counsel, one never adopted by this Court in its *Strickland* cases, granting relief and condemning counsel for declining to advance an affirmative defense that "might" have succeeded as the "only defense available"—and did so even while acknowledging that "*no Supreme Court case has specifically addressed a counsel's failure to advance the defendant's only affirmative defense.*" Pet. App. 4, 6, 8 (italics added).

The panel failed to review deferentially either the state-court adjudication or trial counsel's challenged decision—let alone engage in the "double deference" this Court prescribes for claims such as Mirzayance's. See *Yarborough* v. *Gentry*, 540 U.S. 1, 5 (2003) (per curiam),

and *Musladin*, 127 S. Ct. at 654. Nothing in the opinion addresses the dispositive § 2254(d) question of whether the state-court decision was at least reasonable under clearly established law. *Yarborough* v. *Alvarado,* 541 U.S. 562, 666 (2004); *Lockyer* v. *Andrade*, 538 U.S. 63, 71, 75 (2003); see *Van Patten*, 128 S. Ct. at 747. As in *Rice* v. *Collins*, 546 U.S. 333, 342 (2006), "[t]hough it recited the proper standard of review," at the outset of its reinstated opinion, the Ninth Circuit improperly ignored that standard, and then substituted its de novo evaluation of a federal evidentiary hearing record for the state court's evaluation of the state court's record.

Under proper application of § 2254(d), the state-court adjudication of Mirzayance's ineffective-counsel claim is conclusive because it was neither "contrary to" nor an "unreasonable application" of the two-pronged "deficient performance" and "probable prejudice" standard set out by this Court in *Strickland* v. *Washington*—the "clearly established Federal law" that governs this case. See *Williams*, 529 U.S. at 405. The California Supreme Court was free to apply the general *Strickland* test for assessing performance and probable prejudice. It was not compelled by this Court's holdings to adopt the panel majority's novel "nothing to lose/sole defense" corollary to *Strickland* in Mirzayance's favor in assessing the withdrawal of the "affirmative defense" of insanity. This Court's decisions do not support, let alone "clearly establish," such a test. In fact, the Ninth Circuit panel conceded that neither *Strickland* nor any other holding of this Court has held that an attorney rendered constitutionally deficient performance under the Federal Constitution by deciding, after full investigation, not to pursue an affirmative state-law defense. Nor has this Court ever held that a defense attorney must advance such a defense if it is "the only defense available" and "might" succeed, as the panel

majority ultimately declared in this case. Pet. App. 6, 8. The novel rule sought by Mirzayance and employed by the majority was a prohibited extension of the general *Strickland* rule to something beyond the matrix established by this Court's holdings, and thus is not "clearly established law." *Musladin*, 127 S. Ct. at 654.

2. Besides erring under AEDPA in extending the *Strickland* rule at all, the panel majority extended it in untenable ways. The extension of *Strickland* employed in this case cannot be reconciled with this Court's teaching that counsel does not perform deficiently by making an informed decision to forgo a bona fide defense, *United States* v. *Cronic*, 466 U.S. 648, 656, n.19 (1984), or a non-frivolous argument, *Jones* v. *Barnes*, 463 U.S. 745, 751-54 (1983). Such a rule would also derogate from *Strickland* as an impractical bright-line rule. Attorneys have never been obligated to advance all nonfrivolous claims or defenses or arguments, all of which might at least theoretically succeed and thus benefit their clients. See *Jones*, 463 U.S. at 751-54; *Evitts* v. *Lucey*, 469 U.S. 387, 394 (1985). And any constitutional rule requiring attorneys to set aside their professional judgment and to instead pursue theories of advocacy under a "sole defense/nothing to lose" standard would flatly conflict with, and be more restrictive than, the ethical guidelines and rules of professional conduct set forth by the American Bar Association.

3. Under *Strickland*, it was objectively reasonable for the California Supreme Court to deny Mirzayance's claim for lack of prejudice. Even if Mirzayance's parents and experts would have testified as alleged in his state habeas petitions—that Mirzayance did not know killing Melanie was wrong because he was acting on the paranoid delusion that he needed to defend himself—their testimony met two virtually insurmountable obstacles. First, the proffered expert opinions could not persuasively be reconciled with

the jury's own determination of Mirzayance's mental state at the time of the crime. The jury had previously rejected Dr. Satz's extensive guilt-phase testimony for the defense that Mirzayance's mental impairments prevented him from the more demanding tasks of deliberating and planning a murder. In addition, there was strong evidence in the state-court record of Mirzayance's obvious consciousness of guilt. Mirzayance went to great lengths to conceal his involvement in the murder, and he engaged in goal-oriented behavior including immediately collecting the knife and spent shell casings, showering, disposing of his bloody clothes, and concocting a false alibi on Melanie's answering machine. Further, he explicitly acknowledged the wrongfulness of his actions by telling his friend hours later that he "messed up big time" by killing Melanie, and, shortly after turning himself in, told police detectives that "I did *a murder*." Mirzayance further told the police that he felt "very guilty, very bad . . . for what I've done." And, as Mirzayance later admitted to a court-appointed doctor in a report that was introduced at the evidentiary hearing, he felt his actions "were wrong at [the] time of [the] present offense."

In addition, under a traditional understanding of *Strickland*, the California Supreme Court's denial of the claim was objectively reasonable on "performance" grounds. The state-court record shows that defense counsel Wager's considered decision, approved by Mirzayance and made after consultation with co-counsel and a thorough investigation, was a "reasonable choice" under difficult circumstances. Wager was a highly experienced defense attorney who was well versed in mental health and sanity issues, and who made the challenged decision only after extensive investigation far exceeding what the Constitution requires. He engaged in extensive expert shopping, ultimately retaining eight

expert doctors to evaluate Mirzayance's mental health. He retained jury consultants, conducted a mock trial in which he presented mental health defenses to two juries, hired a private investigator to interview friends and associates of Mirzayance and Melanie Oohktens, and consulted regularly with Mirzayance's parents and their personal attorneys. He reevaluated the case following the jury's unfavorable verdict, and discussed the case with a retained expert doctor and co-counsel before making a final decision. The state-court record fully supports a conclusion that Wager's considered decision was reasonable under prevailing professional norms. The California Supreme Court was entitled to conclude, under this Court's precedent, that Wager's decision was made upon "thorough investigation" and thus "virtually unchallengeable." *Strickland*, 466 U.S. at 690-91.

4. In any event—even if the Ninth Circuit somehow were allowed to dispense with deferential review and rely on a federal evidentiary hearing at all—the panel majority wrongly ignored the district court's findings of fact, which confirmed that Wager did *not* render ineffective assistance and thus bolstered the correctness of the state-court adjudication. Rather than abide by the district court's findings that Wager's decision was rational, carefully considered, and ultimately reasonable given the parents' refusal to testify, it improperly reweighed the evidence. It then supplanted the "key" factual and credibility determinations with its own opposite findings, including that Wager acted "rashly," and that the parents—whom Wager deemed to be the "linchpin" to any remaining chance of success—had *not* refused to testify. This approach ignored the strict § 2254(d) limits on habeas relief for claims adjudicated on their merits in state court. Moreover, the approach contravened the fundamental principle of appellate review that a federal appellate court

must assess a district court's factual findings under the "clearly erroneous" standard of review. The district court's factual findings—which fully support the correctness and the reasonableness of the state-court decision on either prong of *Strickland*—are well supported by the record, and the panel majority was wrong to overrule them.

"Fairminded jurists" considering Mirzayance's claim under *Strickland* could have reached a conclusion different from that of the divided Ninth Circuit panel. See *Alvarado,* 541 U.S. at 666. Indeed, at least *fourteen* state and federal judges so far have disagreed with the panel majority's view. The state courts had great leeway in determining Mirzayance's claim, and their rejection of the claim was owed "doubly-deferential" review. *Id.* at 664; *Gentry*, 540 U.S. at 5. The state-court adjudication was reasonable and therefore conclusive under § 2254(d).

ARGUMENT

THE STATE-COURT REJECTION OF MIRZAYANCE'S INEFFECTIVE-COUNSEL CLAIM WAS CONCLUSIVE BECAUSE IT WAS NEITHER CONTRARY TO NOR AN UNREASONABLE APPLICATION OF THIS COURT'S CLEARLY-ESTABLISHED *STRICKLAND* RULE

The state-court adjudication of Mirzayance's claim was conclusive under § 2254(d) because it was neither contrary to nor an unreasonable application of this Court's clearly established law. Mirzayance is not entitled, under § 2254(d), to the benefit of any "nothing to lose" extension of ineffective-counsel law beyond that recognized by this Court in *Strickland* v. *Washington*, and the Ninth Circuit was wrong to grant relief on the basis of such a view of the law. Under the terms of *Strickland*, the California Supreme Court's rejection of Mirzayance's claim was justified on grounds of lack of prejudice. It is reasonable

to conclude that the NGI plea would have failed in light of the jury's earlier finding that Mirzayance premeditated and deliberated the murder and the strong evidence of his consciousness of guilt. In addition, the California Supreme Court's denial of the claim was also objectively reasonable under *Strickland* on "performance" grounds. The state-court record shows that Wager's considered decision, which was approved by Mirzayance and made after consultation with co-counsel and a thorough investigation, was a "reasonable choice" under difficult circumstances. In any event, the district court's findings of fact were binding on the Ninth Circuit and they support only one conclusion: Mirzayance's ineffective-counsel claim is meritless.

A. The State-Court Adjudication Of This Claim May Not Be Deemed Contrary To Or An Unreasonable Application Of This Court's Clearly Established Law For Declining To Apply The Panel Majority's Novel Extension Of This Court's *Strickland* Rule

1. *Habeas Relief In This Case Was Erroneously Premised Upon A New "Sole Defense/Nothing To Lose" Corollary To This Court's General* Strickland *Standard*

As the dissenting judge and the district court recognized, relief could be granted in this case only by resorting to a novel "nothing to lose" rule for assessing counsel's performance under the Sixth Amendment. Pet. App. 14, 32-33, 96-100. To obtain relief under the facts of this case, Mirzayance would need the benefit of a new bright-line rule that, to render effective assistance under *Strickland*, attorneys must always present any available affirmative defense—regardless of their professional judgment as to its merits—if it is the only defense available, it is non-futile, and there is nothing to lose by proceeding (or nothing to gain by not proceeding).

Mirzayance persuaded the Ninth Circuit to employ such a rule. After the state and district courts rejected his claim, he argued to the Ninth Circuit that "defense counsel was *obligated to present the insanity defense*," stressing that it was "his *only defense*," and that it was withdrawn for "*no tactical advantage*." Appellant's Opening Brief (case 01-56869) (AOB) 38, 40 (italics added). As his principal authority, he cited the grant of habeas relief for failure to present an insanity defense in *Profitt* v. *Waldron*, 831 F.2d 1245, 1259 (5th Cir. 1987), and quoted the appellate court's statement, "'we simply can see *no advantage* in the decision to bypass the insanity defense.'" AOB 40 (quoting *Profitt*, 831 F.2d at 1259) (italics added). He also invoked the Ninth Circuit's own similar comments in two pre-AEDPA direct appeal cases. See *id.* (quoting *United States* v. *Span*, 75 F.3d 1383, 1390 (9th Cir. 1996) ("We have a hard time seeing what kind of strategy, save an ineffective one, would lead a lawyer to deliberately omit his client's *only defense*, a defense that had a strong likelihood of success, and a defense that he specifically stated he had every intention of presenting."), and *United States* v. *Clabourne*, 64 F.3d 1373, 1385-86 (9th Cir. 1995) ("noting that counsel had '*nothing to lose*' in presenting penalty phase expert testimony") (italics added).

The Ninth Circuit's original opinion adopted these "tests" wholesale, repeating verbatim the quotations from *Profitt* and *Span* in remanding the case for an evidentiary hearing. Pet. App. 106. Despite recognizing that the state-court adjudication was reasonable under *Strickland*, the district court perceived that the Ninth Circuit required it to impose a "nothing to lose" rule instead. As the district court explained, "The remand opinion mandates that the applicable *substantive* law by which this Court must judge the remanded claim is the 'nothing to lose' rule pronounced in *Profitt*." Pet. App. 35-37, 99. "Bound by those

matters . . . this Court must find that [Mirzayance] had nothing to lose, and therefore that Wager's performance was deficient." *Id.*

It is true that, when the Warden appealed, the Ninth Circuit disclaimed reliance on its explicit citation to *Profitt*'s "nothing to lose" language. Pet. App. 26. But the majority in fact used that test once again to gauge whether Wager's performance met the constitutional minima. This time, dressing the "nothing to lose" rule in sheep's clothing, the majority simply inverted the phrase. It asserted that Wager's decision "secured only the loss of this *sole potential advantage*," and that "[n]o actual tactical advantage was to be gained from counsel's advice." Having satisfied itself that Wager had nothing to gain by not proceeding, i.e., nothing to lose by proceeding, the panel majority concluded that "'[r]easonably effective assistance' would put on the *only defense available*, especially in a case such as this where there was significant potential for success." Pet. App. 8 (italics added).

The dissenting judge rightly protested that "This is *not* the standard established by *Strickland* and in fact suggests something more akin to the '*nothing to lose*' standard set forth in *Profitt* . . . ." Pet. App. 31-34 (italics added). Indeed, the panel never attempted to explain how the defense expert opinions of insanity—if weighed against the court-appointed expert opinions findings sanity and the jury's finding of premeditation and deliberation—reasonably would have made a difference in a sanity phase. And a mere "potential" for an NGI verdict such as that contemplated by the panel (Pet. App. 8) is not a "reasonable probability" that the jury would have found Mirzayance had met his burden of proof. See *Strickler* v. *Greene*, 527 U.S. 263, 291 (1999) ("reasonable *possibility*" of a different result is a lesser showing than "reasonable *probability*" that a jury would have reached a different

verdict had it considered other evidence). Nor did the panel explain why prevailing professional norms would *obligate* a minimally competent attorney to proceed with an affirmative defense such as NGI simply because it is the "only defense available" or because a jury "*might* be persuaded that [a defendant] was in fact insane." See Pet. App. 6, 8 (italics added). However phrased, the grant of habeas relief in fact depended on a novel standard that, despite the panel's perfunctory citation to *Strickland*, cannot be reconciled with this Court's *Strickland* decisions.

This Court, of course, took the extraordinary measure of granting certiorari, vacating the opinion, and remanding it for reconsideration in light of *Musladin*. The panel majority, however, reinstated its analysis unchanged: despite this Court's order, it declared over another dissent that its analysis was "unaffected" by *Musladin* or its progeny. Pet. App. 4. But under AEDPA as interpreted in cases such as *Musladin*—and under *Strickland* too—the majority's resort to its "nothing to lose" rule was erroneous.

2. *This Court's Cases Do Not Support, Let Alone "Clearly Establish" A "Nothing To Lose" Test For Evaluating Counsel's Effectiveness*

Under § 2254(d), habeas corpus relief may not be granted to Mirzayance on the ground that the California courts' adjudication his claim does not accord with the Ninth Circuit's novel "sole defense/nothing to lose" test. For this Court has never "clearly established" such a novel—if not ill-advised or radical—standard of attorney practice. Cf. *Musladin*, 127 S. Ct. at 651. In fact, neither *Strickland* nor any other case from this Court has held that an attorney renders constitutionally deficient performance under the Federal Constitution by deciding, after full investigation, not to pursue an affirmative state-law

defense. Nor has this Court ever held that a defense attorney must advance such a defense if it is "the only defense available" and "might" succeed, as the panel majority ultimately declared in this case. Pet. App. 6, 8. Rather than recognize a per se rule of effectiveness, this Court instead has explained "that the Federal Constitution imposes one general requirement: that counsel make objectively reasonable choices." See *Roe* v. *Flores-Ortega*, 528 U.S. 470, 477, 479 (2000). The Ninth Circuit's "sole defense/nothing to lose" standard cannot be reconciled with this Court's teaching that counsel does not perform deficiently by making an informed decision to forgo a bona fide defense, *United States* v. *Cronic*, 466 U.S. 648, 656, n.19 (1984), or a non-frivolous argument, *Jones* v. *Barnes*, 463 U.S. 745, 751-54 (1983). Applying such a novel rule to grant habeas relief in this case violated AEDPA because no such rule has been clearly established by this Court. See *Gray* v. *Netherland*, 518 U.S. 152, 166 (1996) ("Only the adoption of a new constitutional rule could establish [the] propositions" sought by the habeas petitioner.).

Despite the panel majority's assertion that review of this case is "unaffected" by it, *Musladin* illustrates that granting relief under an intermediate appellate court's "nothing to lose" rule runs afoul of AEDPA's "clearly established Federal law" limitation. The issue in *Musladin* "was the significance of [this Court's] precedents in a case under § 2254." *Van Patten*, 128 S. Ct. at 745. The Ninth Circuit granted Musladin relief by concluding that it violated due process for the murder victim's family to wear buttons displaying the victim's image in the courtroom. *Musladin*, 127 S. Ct. at 651-52. Reversing, this Court explained that it had never squarely addressed the issue presented. *Id.* at 653-54. This Court gave a tightly circumscribed reading to its prior opinions as governing potential prejudice from "state-sponsored courtroom

practices." Drawing a distinction between state actors and private ones, this Court recognized that "the effect on a defendant's fair-trial rights" of "*spectator* conduct . . . is an open question in our jurisprudence." *Id.* at 653-54 (italics added). It therefore concluded that "[n]o holding of this Court" compelled the state courts to apply its prior courtroom-conduct cases to the defendant's claim, and thus that the state-court decision was not "contrary to or an unreasonable application of clearly established federal law." *Id.* at 654. As applicable here, *Musladin* precludes a grant of habeas relief premised on a condemnation of counsel for failing to advance an affirmative defense because it "might" have been persuasive or was the "only defense available." Pet. App. 6, 8. Because no holding of this Court compelled the California Courts to apply that analysis, let alone decide the matter in Mirzayance's favor, § 2254 bars relief. *Musladin*, 127 S. Ct. at 654.

Schriro v. *Landrigan* further demonstrates that federal habeas courts must defer to state courts deciding ineffective-counsel claims when no Supreme Court holding addresses the category of challenged attorney conduct. See 127 S. Ct. at 1942. In granting relief in *Landrigan*, the Ninth Circuit found counsel ineffective for failing to conduct further investigation into mitigating circumstances in a capital case, even though the defendant had instructed counsel not to present such evidence. Reversing, this Court faulted the Ninth Circuit for misinterpreting *Rompilla* v. *Beard*, 545 U.S. 374 (2005), a case in which this Court had found counsel ineffective under *Strickland* for failing to investigate and present mitigating evidence. In both cases, the defendants had refused to assist in, and to some extent had interfered with, the development of a mitigation case. *Rompilla*, 545 U.S. at 380; *Landrigan*, 127 S. Ct. at 1937-38, 1943. But in *Landrigan* the defendant took a more active role, by "inform[ing] the court" that he

did not want mitigating evidence presented. The *Landrigan* Court pointedly observed, "we have never addressed a situation like this." 127 S. Ct. at 1942. It therefore held that it was not objectively unreasonable under clearly established law for the state court to decide that Landrigan could not establish *Strickland* prejudice. *Id.*

This Court limited the scope of "clearly established law" even further in *Wright* v. *Van Patten*, 128 S. Ct. 743 (2008) (per curiam). The Seventh Circuit, following a *Musladin* GVR, reinstated its earlier decision granting habeas relief on a claim that trial counsel was ineffective for appearing at a hearing by speakerphone. As in the instant case, the circuit court brushed aside the *Musladin* GVR as having no effect on its prior decision. This Court summarily reversed, explaining that none of its previous holdings had "squarely addresse[d]" such an ineffective-assistance claim. This Court concluded, "Because our cases give no *clear answer* to the question presented, let alone one in Van Patten's favor, 'it cannot be said that the state court unreasonably applied clearly established Federal law.' Under the explicit terms of § 2254(d)(1), therefore, relief is unauthorized." *Id.* at 747 (quoting *Musladin*, 127 S. Ct. at 654) (italics added and punctuation omitted).

These cases demonstrate precisely what the Ninth Circuit panel ignored: that "clearly established Federal law" is limited to holdings of this Court from cases where the facts are similar to the case *sub judice*. See, *e.g.*, *Landrigan*, 127 S. Ct. at 1942. In contrast to the Ninth Circuit here, several other circuits quickly grasped the import of *Musladin*. See, *e.g.*, *Rodriguez* v. *Miller*, 499 F.3d 136 (2d Cir. 2007) (denying habeas relief following a *Musladin* GVR); *House* v. *Hatch*, 527 F.3d 1010 (10th Cir. 2008) (recognizing that post-*Musladin*, the absence of a Supreme Court case at least similar to the case *sub judice*

means there is no "clearly established" law under § 2254(d)).

Ironically, the panel majority employed the very *absence* of direct Supreme Court holdings to justify its grant of habeas relief. Partially quoting *Panetti* v. *Quartermain*, 127 S. Ct. 2842, 2858 (2007), the majority said that AEDPA does not "'require state and federal courts to wait for some nearly identical fact pattern before a legal rule must be applied,'" and does not "'prohibit a federal court from finding an application of a principle unreasonable when it involves a set of facts "different from those of the case in which the principle was announced."'" Pet. App. 11. But the panel majority ignored the next and most important sentence, which explained: "These principles guide a reviewing court that is faced, as we are here, with *a record that cannot, under any reasonable interpretation of the controlling legal standard, support a certain legal ruling.*" *Panetti*, 127 S. Ct. at 2858 (italics added). In this case, however, the extensive record considered by the state courts can, under *many* reasonable interpretations, support the state-court adjudication. Rather than undertake a deferential inquiry such as that described in *Panetti*, the panel majority shrugged off the absence of applicable Supreme Court holdings as "not carry[ing] the day" under § 2254(d), and instead announced that its prior, vacated grant of relief was proper "especially in light of *Panetti*." Pet. App. 4, 11.

The panel majority's approach turns AEDPA on its head. Under § 2254(d), the absence of a Supreme Court holding that "squarely addresses" an issue or gives the state courts a "clear answer" to the question presented *does* "carry the day." Without such a holding, "it cannot be said that the state court unreasonably applied clearly established Federal law." *Van Patten*, 128 S. Ct. at 747. The Ninth Circuit saw *Panetti* as somehow justifying de

novo review when the facts of a state case can be distinguished from this Court's precedent. But *Panetti* did no such thing. *Panetti* simply explained that under § 2254(d): (1) a Supreme Court holding may "clearly establish" a principle that will govern later cases with different facts; and (2) even a general rule can be applied in an unreasonable manner. See *Panetti*, 127 S. Ct. at 2858 (citing *Williams*, 529 U.S. at 362). But *Panetti* nonetheless emphasized what the Ninth Circuit disregarded: that the dispositive inquiry under § 2254(d) is whether a state-court decision can be "reconciled with any reasonable application of the controlling standard" set forth in by this Court. *Id.* Contrary to the majority's view, because *Strickland* is a general test, a federal habeas court owes *greater* deference to a state adjudication, not less. As this Court instructed the Ninth Circuit in another case defining § 2254(d) deference:

> Applying a general standard to a specific case can demand a substantial element of judgment. As a result, evaluating whether a rule application was unreasonable requires considering the rule's specificity. *The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations.*

Alvarado, 541 U.S. at 664 (observing that, in a *Miranda* claim challenged under § 2254(d), "fairminded jurists" could disagree with whether the defendant was in custody) (italics added); see also *Landrigan*, 127 S. Ct. at 1942; *Gentry*, 540 U.S. at 5 (*Strickland* mandates "doubly deferential" judicial review under AEDPA).

In contrast, if a general rule such as the *Strickland* test must be modified or extended before it can apply to the facts at hand under § 2254(d), then that extension cannot have been "clearly established" at the time of a state-court decision. See *Alvarado*, 541 U.S. at 666. The "sole

defense/nothing to lose" rule sought by Mirzayance and employed by the majority was just this type of prohibited extension of a general rule. As the dissenting judge aptly stated, the "law" applied by the Ninth Circuit panel to overturn the decision by the California courts "is *not* the standard established by *Strickland* and in fact suggests something more akin to the 'nothing to lose' standard set forth in *Profitt* . . . ." Pet. App. 31-34 (italics added). The California Supreme Court was not compelled by this Court's holdings to adopt such a test when deciding Mirzayance's claim, let alone to resolve the claim in his favor.

3. *A "Nothing To Lose" Test Would Be An Untenable Departure From Existing Sixth Amendment Jurisprudence And Would Create An Unworkable Standard Of Practice For Attorneys*

Besides erring under AEDPA in extending the *Strickland* rule at all, the panel majority extended it in untenable ways. The court of appeals' "sole defense/nothing to lose" corollary to *Strickland* apparently would require that attorneys always advance any potentially meritorious affirmative defense. Until this case, advancing an affirmative defense, including a state-law-created affirmative defense such as NGI, on the ground that it "might" succeed or is the "only defense available," had never been treated as a requirement of the Sixth Amendment. Attorneys have never been obligated to advance all nonfrivolous claims or defenses or arguments, all of which might at least theoretically succeed and thus benefit their clients. See *Jones*, 463 U.S. at 751-54 (appellate counsel has no constitutional duty to raise every nonfrivolous issue requested by a defendant); *Evitts* v. *Lucey*, 469 U.S. 387, 394 (1985) (same). Even when there *is* a bona fide defense, "counsel may still advise his client

to plead guilty if that advice falls within the range of reasonable competence under the circumstances." *Cronic*, 466 U.S. at 656, n.19; cf. *Landrigan*, 127 S. Ct. at 1942.

A "sole defense/nothing to lose" test would also derogate from *Strickland* as an impractical bright-line rule. An attorney's decision may be informed and reasonable, and therefore not deficient under *Strickland*, even where there may be "nothing to lose" (or gain) by choosing differently. Under the panel majority's test, however, defense attorneys would be required to set aside their informed judgment as to the appropriateness of a defense. Instead, they would be *constitutionally compelled* to advance any and all affirmative defenses—including those that they determined were inappropriate or had little or no chance of success—as long as a defendant had "nothing to lose" by proceeding. Such a rule could compel attorneys to make any number of non-futile objections, motions, arguments, etc., in case a post-conviction attorney claiming ineffectiveness of trial counsel succeeds in convincing the federal court there was no harm to the defendant in trying. Such an unthinking and indiscriminate approach to litigation would waste scarce judicial resources and certainly raise ethical questions. It would be, in any event, a radical departure from traditional Sixth Amendment jurisprudence. This Court has "consistently declined to impose mechanical rules on counsel—*even when those rules might lead to better representation . . . .*" *Flores-Ortega*, 528 U.S. at 481 (italics added); and see, *e.g.*, *id.* at 478 (rejecting as inconsistent with *Strickland* a "bright-line rule" obligating counsel to file a notice of appeal unless instructed otherwise by a defendant).

Other circuit courts of appeals have rejected the "sole defense/nothing to lose" test enforced by the panel majority in this case. As the Seventh Circuit has stated:

We refuse to hold that [counsel's] prudent, good-faith

> decision to forego an insanity defense (after investigation) constitutes ineffective assistance of counsel. Implicit in such a holding would be the notion that in order to represent a criminal defendant competently, an attorney must not only pursue each and every possible psychiatric defense, but perhaps also search out and present questionable "expert" testimony in support of such arguments. A holding of this kind would defy common sense and contradict well-established case law . . . .

Jones v. *Page*, 76 F.3d 831, 843 (7th Cir. 1996); see also, *e.g.*, *Cepulonis* v. *Ponte*, 699 F.2d 573, 575 (1st Cir. 1983) ("[C]ounsel need not chase wild factual geese when it appears, in light of informed professional judgment, that a defense is implausible or insubstantial as a matter of law, or, as here, as a matter of fact and of the realities of proof, procedure, and trial tactics.").

A rule requiring attorneys to pursue theories of advocacy under a "sole defense/nothing to lose" would also conflict with guidelines set forth by the American Bar Association (ABA). While the ABA standards require more than the minimal level of competence contemplated by the Sixth Amendment, see *Wiggins* v. *Smith*, 539 U.S. 510, 524 (2003), the "nothing to lose" rule as applied in this case would set a constitutional standard that exceeds even that of the professional organization. For example, the ABA's Model Rules of Professional Conduct dictate that an attorney should advance only "meritorious claims and contentions," and only when an attorney determines he or she can make "good faith arguments in support of their clients' positions." MODEL RULES OF PROF'L CONDUCT R. 3.1 (Comment 2002). The Annotation points out that lawyers have been disciplined for pursuing claims after it became clear that no basis for the claims existed. *Id.* at Annotation. Moreover, ABA Standard for Criminal Justice

4-5.1 requires an attorney to advise the accused as follows: "After informing himself or herself fully on the facts and the law, defense counsel should advise the accused with complete candor concerning all aspects of the case, including a candid estimate of the probable outcome." But the ABA Standards further state that the "ultimate decision" on key matters such as "what pleas to enter" is *not* for the attorney, but must "be made by the accused after full consultation." ABA Standards for Criminal Justice 4-5.2(a).

Here, the district court determined that Wager, after careful consideration, extensive investigation, and consultation with "experienced co-counsel," rationally and reasonably concluded that he had no basis to proceed with an affirmative NGI defense. Pet. App. 68-70. He advised Mirzayance of his recommendation to withdraw the NGI plea, and Mirzayance concurred and personally withdrew it. Wager's decision comported with both *Strickland* and the ABA guidelines—just not with the Ninth Circuit's untenable standard. The Ninth Circuit's novel test would supplant the standard in Model Rule 3.1—to advance only meritorious claims when a well-informed lawyer determines they may be argued in good faith—with a requirement that all lawyers must advance any non-futile argument if there is "nothing to lose."

A "sole defense/nothing to lose" test would further conflict with a lawyer's duty of candor to the tribunal, which encompasses the duty to advance only meritorious claims that the attorney, after reasonable inquiry, determines have evidentiary support. See FRCP Rule 11[3]/;

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3. FRCP Rule 11 states, in pertinent part:

> By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or

MODEL RULES OF PROF'L CONDUCT R. 3.3 (2002). These principles are correctly applied when a well-informed attorney, after thorough investigation, declines to advance motions or defenses that he has assessed as inappropriate or as having little or no chance of success. They would be rendered meaningless by a bright-line rule requiring that attorneys advance motions or affirmative defenses whenever it is their client's "sole defense" and there would be "nothing to lose." Such a rule would wrongly reduce the adversarial process to mere gamesmanship.

B. The California Courts Correctly And Reasonably Rejected Mirzayance's Claim Under *Strickland*

Regardless of whether the Ninth Circuit consciously or explicitly applied a "nothing to lose"-type rule, Mirzayance's claim for relief inevitably depends on such a rule, for it could not succeed under the "doubly-deferential" *Strickland* analysis prescribed by this Court's jurisprudence. Under proper application of AEDPA, however, the state-court adjudication of Mirzayance's claim

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> unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,--
> . . .
> (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law; [and]
>
> (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery . . . .

is conclusive, for the California Supreme Court's rejection of the claim was reasonable under *Strickland*, the "clearly established Federal law" at the time it decided the claim. *Williams*, 529 U.S. at 405. To prevail under *Strickland*, a defendant must show both that counsel's conduct fell below an objective standard of reasonableness, and that the defendant was probably prejudiced by counsel's acts or omissions. *Strickland*, 466 U.S. at 687; accord *Bell* v. *Cone*, 535 U.S. 685, 695 (2002); *Williams*, 529 U.S. at 390. As a habeas corpus petitioner, moreover, Mirzayance also had to show that the state courts' rejection of this claim was "not only erroneous, but objectively unreasonable." *Gentry*, 540 U.S. at 4 (citing *Wiggins*, 539 U.S. at 511, *Woodford* v. *Visciotti*, 537 U.S. 19, 24-25 (2002) (per curiam), and *Williams*, 529 U.S. at 410). As this Court has emphasized, review of *Strickland* claims under AEDPA must be "highly deferential—and doubly deferential when it is conducted through the lens of federal habeas." *Id.*

Here, the California Court of Appeal and California Supreme Court summarily resolved Mirzayance's ineffective-assistance claim on the merits. Pet. App. I & J; *see Hunter* v. *Aispuro*, 982 F.2d 344, 347-48 (9th Cir. 1992). In summarily adjudicating such a claim, the California Supreme Court provisionally assumes that petitioner's allegations of historic facts are true, but concludes that the allegations nevertheless do not make out a prima facie case for relief. See *People* v. *Duvall*, 886 P.2d 1252, 1258-59 (Cal. 1995); *In re Clark*, 855 P.2d 729, 741 n.9 (Cal. 1993). Under the evidence presented to it in this case, the state-court adjudication was well within the matrix of this Court's *Strickland* decisions. Indeed, as noted earlier, this Court has never found ineffective assistance of trial counsel for "reasonable choices" made after a full investigation. See *Flores-Ortega*, 528 U.S. at 477; *Gentry*, 540 U.S. at 5; cf. *Wiggins*, 539 U.S. at 523.

The state-court adjudication "was supported by the record." Cf. *Gentry*, 540 U.S. at 4. The claim-defining factual allegations and supporting evidence considered by the federal courts had been presented to the state courts in the form of voluminous declarations from Wager, co-counsel Boyle, the defense mental health experts, the defense investigators, a "*Strickland* expert," Mirzayance's parents, the family's attorneys James and Eric Lund, Mirzayance's childhood teachers in France, and several of Mirzayance's friends. See, *e.g.*, Exs. 1-22. The direct testimony of the key witnesses[4/] at the federal evidentiary hearing consisted of the same declarations filed in state court. And although Wager provided a more detailed explanation at the hearing of his thought-process, the additional details were consistent with his state-court declaration. Cf. *Lambert* v. *Blodgett*, 393 F.3d 943, 970 (9th Cir. 2004) (district court's failure to defer to the state court adjudication was especially inappropriate where federal evidentiary hearing uncovered little new evidence, and the district court's findings relied on testimony that also had been presented to the state courts). Moreover, none of the facts upon which the state court could have relied were contradicted at the federal evidentiary hearing. In light of the state court record, and under the requisite "doubly-deferential" review, it would not be unreasonable for a state court to conclude that Mirzayance had failed to establish either one or both of the two requisite prongs—deficient performance and prejudice—of a constitutional claim under *Strickland*.

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4. These witnesses consisted of defense counsel Wager, Mirzayance's parents, their attorney James Lund, and the defense mental health experts.

1. *The State-Court Rejection Of The Claim Was Reasonable In Light Of Mirzayance's Inadequate Showing Of "Prejudice."*

Relief is unavailable under § 2254(d)(1) because the state-court adjudication of Mirzayance's claim was at least "reasonable" under *Strickland* in light of his unpersuasive showing of "prejudice." The prejudice prong of the *Strickland* test placed on Mirzayance a burden—and in this case an insurmountable one—to show that "there is a reasonable probability that, but for counsel's unprofessional errors, *the result of the proceeding* would have been different." *Williams*, 529 U.S. at 391 (italics added). And, as *Strickland* explained, "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed." 466 U.S. at 697.

In his previous "prejudice" arguments in this case, Mirzayance has incorrectly conflated the entering of a plea of guilty based on poor legal advice, as occurred in *Hill* v. *Lockhart*, 474 U.S. 52 (1985), with the withdrawal of an affirmative defense such as NGI based on poor legal advice. Contending that *Hill* controls, he has argued that he need only show a reasonable probability that he would not have withdrawn his insanity plea but for Wager's allegedly poor advice. See Pet. App. 84-86. His argument is flawed in several respects. Unlike a *Hill* guilty plea that admits the elements of an offense, a California defendant's NGI plea does not directly gainsay his alleged guilt but rather invokes an affirmative defense. See generally *Martin* v. *Ohio*, 480 U.S. 288 (1987); *Patterson* v. *New York*, 432 U.S. 197 (1977). Unlike guilt, which the State must prove beyond reasonable doubt, a California defendant bears the burden to prove insanity by a preponderance of the evidence. See Cal. Penal Code § 25(b); *People* v. *Hernandez*, 994 P.2d 354, 359 (Cal. 2000)

("Sanity proceedings do not constitute an *action*. Insanity is a plea raising an *affirmative defense* to a criminal charge, [albeit] one that does not negative an element of the offense.") (original italics).

No decision of this Court has squarely addressed what constitutes "prejudice" in the context of a challenge to a decision to forgo such an affirmative defense, and whether it differs from a consideration, in *Strickland* terms, of the likelihood that the ultimate result of the trial would have been different. Nor has this Court extended *Hill* to a withdrawal of a state-law-based affirmative-defense plea, cf. *Gilmore* v. *Taylor*, 508 U.S. 333, 343 (1993) (distinguishing due-process instructional law on elements of crime from that of affirmative defenses), let alone "clearly established" that courts must apply a type of per se prejudice rule to incompetence in this category of attorney performance. As in *Van Patten*, no decision of this Court "clearly establishes" an ineffective-counsel prejudice rule more strict than that of considering the likelihood that the defendant otherwise would have obtained of a more favorable ultimate "result." *Van Patten*, 128 S. Ct. at 746 (no decision of this Court clearly establishes that *Cronic*'s per se ineffectiveness standard should replace *Strickland*'s two-pronged inquiry in reviewing counsel's participation by speaker phone). Even if it were indisputable that Mirzayance in fact would have adhered to his NGI plea but for counsel's advice to withdraw it, then, it still would follow that the state-court adjudication did not run afoul of "clearly established law" in light of his inadequate showing that an NGI plea would have succeeded. See *Musladin*, 127 S. Ct. at 65. As a consensus of circuit courts reasonably suggests, "prejudice" under this scenario means demonstrating a reasonable probability that the jury otherwise would have found Mirzayance not guilty by reason of insanity. See,

e.g., *United States* v. *Cox*, 826 F.2d 1518, 1525-26 (6th Cir. 1987); *Profitt*, 831 F.2d at 1250-51; *Weekley* v. *Jones*, 76 F.3d 1459, 1462 (8th Cir. 1996); *Weeks* v. *Jones*, 26 F.3d 1030, 1038 (11th Cir. 1994).

And, at the very least, the federal habeas court must grant the state courts wide latitude in applying *Strickland*'s general prejudice test to the question of whether Mirzayance's NGI proof would have prevailed. *Alvarado*, 541 U.S. at 664. To prevail on an insanity claim under California law, the defendant must prove by a preponderance of the evidence that he was legally insane: that—regardless of whether he suffered from a mental disease or disability—he either could not appreciate the nature and quality of his actions at the time he committed the crime or could not appreciate the wrongfulness of those actions. Cal. Penal Code § 25(b); *Skinner*, 704 P.2d at 763-65. Here, only the latter question was at issue, for no one opined in any court that Mirzayance failed to appreciate that he was using a knife and a gun to kill.

Even if Mirzayance's parents and experts would have testified as alleged in his state habeas petitions, it would not be "objectively unreasonable" to conclude under *Strickland* that Mirzayance had failed to establish a "reasonable probability" that the jury would have found he could not appreciate the wrongfulness of his actions. Although the defense experts might have opined that Mirzayance did not know killing Melanie was wrong because he was acting on the paranoid delusion that he needed to defend himself, their testimony would have met the insurmountable obstacle of Mirzayance's obvious consciousness of guilt. Mirzayance parked his car some distance from the Ookhtens's house on the night of the murder. He waited until he was alone with Melanie in the house before he closed the curtains and commenced his attack with a silent weapon, the knife, resorting to the gun

only when Melanie began to scream and struggle. He immediately collected the knife and spent shell casings after the murder. He showered. He disposed of his bloody clothes in a trash can. And he concocted a false alibi on Melanie's telephone answering machine. Pet. App. 39-41, 123-25.

Further, he explicitly acknowledged the wrongfulness of his actions. He told his friend that same night that he "messed up big time" by killing Melanie. He explained to detectives that, right after disposing of his bloodstained clothes, "I went to the Pasadena Police and said I did *a murder*." Pet. App. 40-41, 169; CT 179 (italics added). When police asked how he felt about what he had done, he replied, "Very guilty; that's why I turned myself in." Asked if he felt "good" about his actions, he said, "No, very guilty, very bad . . . for what I've done." CT 181-82. Given these undisputed facts, it is not objectively unreasonable to conclude that Mirzayance so obviously understood the wrongfulness of his actions that his withdrawal of the NGI plea does not undermine confidence in the trial result.

Even if defense experts testified that Mirzayance somehow thought he needed to defend himself, their testimony would not compel the California Supreme Court to find *Strickland* prejudice. There was no direct evidence that Mirzayance held such a belief. He never submitted a declaration to that effect; there has never been a suggestion that he would have testified to that effect; and there is no evidence that he actually made such a claim to the defense experts. While the experts all described Mirzayance's claims to having previously experienced visual and auditory hallucinations, *none* opined he was hallucinating at the time he attacked Melanie. To the contrary, Mirzayance told police just hours after the murder that he killed Melanie because she had "pissed [him] off," *not* because he had to defend himself for any

reason, real or imagined.

Moreover, no defense expert disputed that Mirzayance knew that it was wrong to kill. Thus, the mere *speculation* by additional defense experts—that Mirzayance acted because of a paranoid delusion that he needed to defend himself—would have scant evidentiary weight, if any. The proffered expert opinions could not reasonably be reconciled with the jury's own determination that Mirzayance was guilty of premeditated and deliberate murder. The jury had previously rejected Dr. Satz's extensive guilt phase testimony that Mirzayance's mental impairments prevented him from the more demanding tasks of deliberating and planning a murder. Pet. App. 153-54.

The state-court record supports a reasonable conclusion that the jury would not have found Mirzayance could prove he met California's definition of insanity at the time of the killing. Given the lack of *Strickland* prejudice, the California Courts were not wrong—let alone "objectively unreasonable"—in rejecting Mirzayance's claim.

2. *The State-Court Rejection Of The Claim Was Reasonable In Light Of Mirzayance's Inadequate Showing Of Unreasonable Attorney "Performance."*

The state-court record also supports a finding that Wager's conduct comported with the "one general requirement" imposed by the Federal Constitution: "that counsel make objectively reasonable choices." *Flores-Ortega*, 528 U.S. at 477; see also *Burger* v. *Kemp*, 483 U.S. 776, 794 (1987) (courts are to address *not* "what is prudent or appropriate, but only what is constitutionally compelled"). In assessing whether counsel in fact made a "reasonable choice," "hindsight is discounted by pegging adequacy to 'counsel's perspective at the time.'" *Rompilla*, 545 U.S. at 381 (quoting *Strickland*, 466 U.S. at 689, 691).

A reviewing court will "strongly presume [that counsel] rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Strickland*, 466 U.S. at 690. Such review must be "highly deferential—and doubly deferential when it is conducted through the lens of federal habeas." *Gentry*, 540 U.S. at 5.

Traditionally, when assessing *Strickland* "performance," this Court has not focused on whether a challenged decision by an attorney made during trial was correct, or even prudent. See *Burger*, 483 U.S. 794. Rather, this Court's primary concern has consistently been whether counsel's decision was supported by a reasonable investigation, and was thus informed. See, *e.g.*, *Wiggins*, 539 U.S. at 523 (italics added). After that, tactical decisions made upon "thorough investigation" are "virtually unchallengeable." *Id.*

This Court has never set out any "clearly-established Federal law" disqualifying any particular litigation decisions, following full investigation, from being deemed "tactical." As in *Schriro* v. *Landrigan*, this Court has "never addressed a situation like this." 127 S. Ct. at 1942. Here, the California Courts were entitled to conclude that counsel's decision to forgo the NGI defense was rational, carefully considered, and well informed. Especially when viewed with "double deference" under AEDPA, it was a "reasonable choice" in light of the circumstances. See *Flores-Ortega*, 528 U.S. at 477; Pet. App. 68-71.

Wager—a highly experienced defense attorney who was well versed in the legal requirements of an NGI defense from his years as a "supervising expert on mental and insanity issues" at the Los Angeles District Attorney's Office—made the challenged decision only after extensive investigation exceeding what the Constitution requires. For example, Wager engaged in extensive expert

shopping, although he had no constitutional obligation to do so. See Ex. 9 at 1-2 (Decl. of Attorney Lund[5]); *id.* at 21-34 (Wager's "Work Schedule"); *Hendricks* v. *Calderon*, 70 F.3d 1032, 1038 (9th Cir. 1995). A reasonably competent lawyer might well have retained mental health experts and received negative opinions, such as those rendered in this case by Drs. Anderson, Sandhu, and Maloney. If a reasonable attorney had done so, he would have been entirely justified in not pursuing an NGI defense at all. This alone satisfies a proper competence inquiry under *Strickland*, and validates the "reasonableness" of the state-court adjudication. See *Calderon*, 70 F.3d at 1038.

In any event, Wager did far more than what was *minimally* required. He ultimately retained no fewer than eight expert doctors to evaluate Mirzayance's mental health. He retained jury consultants, conducted a mock trial in which he presented mental health defenses to two juries, hired a private investigator to interview friends and associates of Mirzayance and Melanie Oohktens, and consulted regularly with Mirzayance's parents and their personal attorney Lund. Ex. 6 at 12 (Decl. of Dr. Vicary); Ex. 9 at 2-3, 21-34 (Work Schedule). Wager also reevaluated the case following the jury's unfavorable verdict of willful, premeditated, and deliberate murder, and discussed the case with Dr. Blum the night before. Ex. 1 at 3-4 (Decl. of Dr. Blum); Ex. 15 at 2-3 (Decl. of Wager); Pet. App. 68-70. Even after the parents informed him that they would not testify, he consulted with co-counsel Boyle before making a final decision and advising Mirzayance. Ex. 15 at 2-3 (Decl. of Wager); Pet. App. 69-71.

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5. As noted, the significant documents and declarations admitted at the federal evidentiary hearing and discussed in this argument had all been submitted by Mirzayance to the state courts in habeas corpus proceedings. See Exs. 1-22.

Contrary to the Ninth Circuit panel's implication, Wager was not operating under any misconception that a first degree murder verdict precludes an insanity finding as a matter of law. See Pet. App. 6 at n.1. He simply recognized that the overwhelming evidence of Mirzayance's planning, malice, and attempts to cover his tracks, made it highly unlikely that the jury, which had already found Mirzayance premeditated and deliberated, would find he could not tell right from wrong or appreciate the wrongfulness of his act. See Ex. 15 at 2-3 (Decl. of Wager); Pet. App. 68-71, 153-54. Finally, for all the additional reasons discussed above in the context of prejudice, it was reasonable for Wager to conclude that an insanity defense would not have succeeded.

The record before the state courts fully supports a conclusion that Wager made a "reasonable choice." See *Strickland*, 466 U.S. at 690-91; *Flores-Ortega*, 528 U.S. at 481. Even if the California Supreme Court's decision was somehow *incorrect*, it cannot fairly be labeled as "objectively unreasonable" when viewed with the requisite "double deference." See *Gentry*, 540 U.S. at 5; *Musladin*, 127 S. Ct. at 654.

C. The District Court's Factual Findings Confirm That Wager Did Not Render Ineffective Assistance, And The Ninth Circuit Panel Erred By Supplanting Them With Its Own, Opposite Factual Findings

Even if the federal habeas court somehow were empowered to ignore deferential review under § 2254(d) and to hold an evidentiary hearing to resolve the claim instead, Mirzayance still would not be entitled to habeas relief.[6/] Here, at the Ninth Circuit's direction, the district

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6. Mirzayance presented an ineffective-counsel claim to the state court and received a summary-judgment-type adjudication rejecting

court indeed held an evidentiary hearing. The district court's factual findings and credibility determinations, made after a four-day hearing, fully confirmed the "reasonableness" of the state-court adjudication. The

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the claim on its merits. In federal court, no evidentiary hearing could be necessary, or efficacious, in resolving the pure legal question of whether that state-court ruling met the deferential § 2254(d) standard. See, *e.g.*, *Williams*, 529 U.S. at 444. The § 2254(d) question is primary and dispositive—relief "shall not be granted" except in the rare case where the adjudication was so clearly wrong at the time that it fails to satisfy even the deferential review standard. A finding of unreasonableness must depend solely on the record evidence that had been properly presented to the state court when it adjudicated the federal claim, and not on any evidence newly presented in federal court. *Holland* v. *Jackson*, 542 U.S. 649, 652 (2004) (per curiam).

To the extent that the Ninth Circuit relied on evidence presented only in federal court as a basis for relief without regard to the state-record reasonableness of the state-court adjudication—here, for example, the panel attached importance to newly-presented evidence in the form of defense counsel's testimony about "hopelessness," see p. 49, *post*—the federal court violated § 2254(d) because such evidence was not before the state court when it adjudicated petitioner's claim. If that evidence were essential to the factual basis of the claim, or transformed or enhanced it, it could be considered by the federal court only if Mirzayance presented that newly-improved claim to the state court. See § 2244; *Vasquez* v. *Hillery*, 474 U.S. 254, 260 (1986); see also *Gray*, 518 U.S. at 163; cf. *Williams*, 529 U.S. at 443-44. Any resultant adjudication of that claim would later command § 2254(d) deference in federal proceedings: that is, the habeas petitioner may not circumvent the state court and § 2254(d) deference. The federal court properly could have considered the new evidence only if Mirzayance had been unable to secure a merits ruling from the state court, see *Williams*, 529 U.S. at 443-44, and could overcome any state-law procedural default in failing to secure such a ruling, see *Coleman* v. *Thompson*, 501 U.S. 722, 735 n. 1 (1990); *Teague* v. *Lane*, 489 U.S. 255, 270 (1989); *Murray* v. *Carrier*, 477 U.S. 478, 488-89 (1986)—or if he otherwise also met the strict statutory curbs on federal evidentiary hearings, § 2254(e)(2). Mirzayance made no such showings here. (The Warden notes that related issues are pending before this Court in *Bell* v. *Kelly*, No. 07-1223.)

Ninth Circuit erred in ignoring the findings and substituting its own contrary findings as the basis for relief.

1. The additional evidence adduced at the evidentiary hearing verified the absence of *Strickland* prejudice. As the district court found, the prosecution would have presented the testimony of the two court-appointed experts, Drs. Sandhu and Anderson, both of whom found Mirzayance sane. Pet. App. 65-68. Both of those independent experts did what Mirzayance's hand-picked ones did not do—they offered opinions that were consistent with the facts of the crime and refused to take Mirzayance's self-serving post-crime representations at face value. Most significant, as the district court noted, only Dr. Anderson directly asked Mirzayance what he was actually thinking at the time of the crime. By "direct query," he discovered what Mirzayance's experts studiously avoided: evidence that by itself would have doomed an insanity defense to failure. Dr. Anderson elicited from Mirzayance his admission that he felt his murderous actions of shooting and stabbing Melanie "*were wrong at the time of [the] present offense*." Evidentiary Hearing Transcript (EHT) Vol. IV 10-11 (italics added); Ex. 25 at 4. The district court's fact-finding also made it clear that Wager's NGI decision was competent. Upon a lengthy and painstaking review of the evidence presented to the state and federal courts, the district court made "key" findings that Wager's decision was carefully considered, informed, and not rashly made. The district court found (1) that Wager had hired multiple mental health experts to testify at the sanity phase that Mirzayance had committed the killing without premeditation or deliberation; (2) that Wager had recognized that this expert testimony had "significant weaknesses," and that at the evidentiary hearing he

"convincingly detailed ways in which [the experts] could have been impeached[] for overlooking or minimizing facts which showcased [Mirzayance's] clearly goal-directed behavior"; (3) that the experts were subject to other impeachment, including evidence that one of them had altered his notes in a highly-publicized criminal case; (4) that Wager's strategy at the sanity phase had been to appeal to the jurors' emotions, which required "the heartfelt participation of [Mirzayance's] parents as witnesses"; (5) that Mirzayance's parents refused to testify, which made Wager's sanity-phase strategy "impossible to attempt"; and (6) that, prior to making his recommendation, Wager conferred with his "experienced co-counsel, Lawrence Boyle," who concurred in Wager's proposal. Pet. App. 68-71. Thus, the district court correctly concluded that under *either* deferential or de novo review, counsel was not shown to have rendered ineffective assistance under *Strickland*, and that—absent the Ninth Circuit's "nothing to lose" mandate—Mirzayance would not be entitled to habeas relief.

2. The Ninth Circuit panel, however, erroneously granted habeas relief based on its *own* findings of fact, and without regard to whether the district court's opposite findings were clearly erroneous. This approach violated AEDPA, in that it ignored the strict § 2254(d) limits on habeas relief for claims adjudicated on their merits in state court. See *Gentry*, 540 U.S. at 5 (federal habeas courts must review the *state-court* adjudications of ineffective-counsel claims, and do so with "double-deference.").

The Ninth Circuit's adjudication also contravened fundamental principles of appellate review of trial-court factual determinations, as set forth by the Federal Rules of Civil Procedure and this Court. Fed. R. Civ. P. 52(a); *Anderson* v. *Bessemer City*, 470 U.S. 564, 573-74 (1985). A federal appellate court must assess a district court's factual

findings under the "clearly erroneous" standard of review. Fed. R. Civ. P. 52(a); *Anderson*, 470 U.S. at 573. As long as the trier of fact's account of the evidence "is *plausible* in light of the record viewed in its entirety," a circuit court of appeals may not reverse it "even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Id.* at 573-74 (italics added). Moreover, "appellate courts must constantly have in mind that their function is not to decide factual issues de novo." *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969). The Ninth Circuit violated these rules in this case.

As set forth above, and as recognized by the dissenting judge, "the district court found that the trial counsel had made a rational, carefully considered and informed decision to forgo the insanity defense." Pet. App. 32; see also Pet. App. 69 (district court finding that "The evidence supports [the Warden's] assertion that Wager carefully weighed his options before making his decision final; he did not make it rashly."). The district court also found that the parents' profound reluctance to testify at a sanity trial amounted to "an *express refusal* to testify." Pet. App. 32, 71 (italics added). But, without discussing whether the district court's findings were clearly erroneous, the panel majority concluded: "We disagree that counsel's decision was carefully weighed and not made rashly." Pet. App. 7. And, as for the parents' refusal to testify, the majority inexplicably stated that "the district court's finding that the parents *did not refuse*, but merely expressed reluctance to testify is correct." *Id.* (italics added). Nor did the panel majority discuss whether, in light of their expression of reluctance, a reasonable lawyer would have concluded that he could not use the parents to support an NGI defense.

The panel majority made too much of Wager's statement at the evidentiary hearing that he did not recommend withdrawing the NGI plea out of anger, as was alleged, but rather "I think more out of a sense of hopelessness." Pet. App. 5-6; see EHT Vol. I at 147. The comment simply confirmed that Wager had not acted "rashly," and reflected the opinion he and co-counsel shared: that an NGI defense would have failed under the facts and circumstances known to the defense team at the time. That assessment was, as the district court found, "rational" and "reasonable." Wager logically explained how an NGI case after the first degree murder verdict was, in fact, hopeless—not as a legally- prohibited verdict as a matter of California law, but as a practical matter under the evidence of this case. EHT Vol. I at 53-55, 60, 65, 125, 137, 139-40.

It would be perfectly understandable if Wager was startled or outraged at the unexpected turn of events concerning the parents' refusal to testify, which he felt was a "betrayal" of his client. See EHT Vol. I at 141-42. Despite that, Wager's assessment of the NGI defense as both hopeless and legally baseless in this particular case in fact was based on reasonable professional judgment. EHT Vol. I at 60, 137, 145-47. Such an assessment may not be condemned as *Strickland* incompetence. See, *e.g.*, *Evans* v. *Meyer*, 742 F.2d 371, 374 (7th Cir. 1973) (lawyer need not advise client of "every defense or argument or tactic that while theoretically possible is hopeless as a practical matter").

The dissenting judge rightly faulted the majority for granting relief based on its independent findings, made "without regard to the lower court's factual and credibility findings made after a four-day evidentiary hearing." Pet. App. 13-14. The district court's factual findings—which fully support the correctness and the reasonableness of the state-court decision—are well supported by the record, and

the panel majority did not suggest otherwise. As discussed earlier, the district court articulated at least six separate categories of evidence in support of its first "key" finding—that counsel's decision was carefully considered, informed, and not rashly made. See Pet. App. 68-71. As for the district court's second "key" finding—that the parents refused to testify—the district court dedicated an entire section of evidentiary analysis to the issue. Over the course of five pages, the district court detailed the extensive live testimony and record evidence upon which the court made its credibility determinations. Pet. App. 71-76.

It was improper for the panel majority, confronted with a cold record and with no opportunity to observe and compare the demeanor and persuasiveness of the witnesses, to twice set aside the district court's well-supported factual findings and to conclude instead that Wager's decision was "made rashly" and was not carefully weighed. It was equally improper for the panel majority to disregard the finding that the parents' conduct amounted to "an express refusal to testify" and to conclude instead that Wager "did not know with any certainty that Mirzayance's parents would not testify . . . ." Pet. App. 7.

In making its own contrary findings, the Ninth Circuit panel ignored the settled rule that "[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *United States* v. *Yellow Cab Co.*, 338 U.S. 338, 342 (1949); see also *Anderson*, 470 U.S. at 573-74; *Zenith*, 395 U.S. at 123. Similarly, as noted above, the Ninth Circuit's factfinding violated AEDPA. As this Court recently stressed in *Rice* v. *Collins*, "[a] panel majority's attempt to use a set of debatable inferences to set aside the conclusion reached by the state court does not satisfy AEDPA's requirements for granting a writ of habeas corpus." *Rice*, 546 U.S. at 342.

CONCLUSION

The judgment of the court of appeals should be reversed.

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Respectfully submitted,

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